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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1980

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner

v.

LOY D. ALCORN,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CIVIL APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1. Is a railroad employee acting within the course and scope of his employment so as to subject his employer to liability under the Federal Employers' Liability Act when he perpetrates a practical joke for the purpose of scaring a co-employee?

2. Can failure to discipline constitute a basis for liability under the Federal Employers' Liability Act when there is no evidence that railroad officials had knowledge or notice of past rule violations?

LIST OF PARTIES

Petitioner — Missouri Pacific Railroad Company.[1]

Respondent — Loy D. Alcorn.

[1] In compliance with Rule 28.1 of the Rules of the Supreme Court of the United States, as amended, Petitioner sets forth the following list of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates: Parent — Missouri Pacific Corporation. Affiliate — Mississippi River Transmission Company. Subsidiaries (except wholly owned subsidiaries) — The Alton & Southern Railway Company; Arkansas & Memphis Railway Bridge and Terminal Company; The Belt Railway Company of Chicago; Brownsville & Matamoros Bridge Company; Chicago and Western Indiana Railroad Company; Galveston, Houston & Henderson Railroad Company; Great Southern Railroad, Inc.; Houston Belt & Terminal Railway Company; Illinois Terminal Railroad Company; Jefferson Southwestern Railroad Company; Kansas City Terminal Railway Company; The Pueblo Union Depot and Railroad Company; The Pullman Company; Southern Illinois and Missouri Bridge Company; Terminal Industrial Land Company; Terminal Railroad Association of St. Louis; Texas City Terminal Railway Company; Trailer Train Company; and The Weatherford, Mineral Wells & Northwestern Railway Company.

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, rendered on April 2, 1980, is reported at 598 S.W.2d 352.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas was entered on April 2, 1980. The Court of Civil Appeals denied Petitioner's Motion for Rehearing on April 23, 1980. The Supreme Court of Texas "refused, no reversible error," Petitioner's Application for Writ of Error on July 16, 1980, and overruled Petitioner's Motion for Rehearing on October 22, 1980, making final the decision of the Court of Civil Appeals.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(3), because a right specially set up and claimed under a statute of the United States is involved herein.

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is the Federal Employers' Liability Act, 45 U.S.C.A. §51, *et seq.* ("FELA"), which provides in pertinent part as follows:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

This suit was brought by Respondent under the Federal Employers' Liability Act, 45 U.S.C.A. §51, *et seq.* ("FELA") to recover from Petitioner ("Missouri Pacific") damages for personal injuries which he claims to have sustained as the result of an incident that occured on February 1, 1976. On that date, Respondent was working as a conductor on a Missouri Pacific train designated the Angleton Switcher. The Angleton Switcher had been traveling southbound on the main line toward Liverpool, Texas, but as it approached Liverpool it moved onto a siding track that was located east of the main line. While the Angleton Switcher was approaching, another Missouri Pacific train, the Amoco Switcher, was stopped on the main line, waiting for the Angleton Switcher to move into the siding.

While the Angleton Switcher approached, Edward D. Calloway, the fireman on the Amoco Switcher, placed approximately three to six "torpedoes" on the rail of the siding track. A torpedo is a small explosive device that is designed to be used as a railroad signal. In its proper use, a torpedo is placed on a rail of the track and is detonated when a wheel of the locomotive rolls over it. Upon hearing a torpedo detonate, the operator of the locomotive is supposed to immediately reduce the speed of his train and prepare to stop.

Missouri Pacific's Uniform Code of Operating Rules specifically provides that torpedoes are "not to be left at places where they may cause injury." In addition, Missouri Pacific's Uniform Code of Safety Rules provides that employees are to "use torpedoes . . . for signaling only. Care must be exercised to avoid injury from explosion or burning material." Finally, Rule N of Missouri Pacific's General Safety Rules provides that "Employees must not enter into altercations, play practical jokes, scuffle or wrestle on company property."

Mr. Calloway admitted that his conduct violated all of the above rules and that his sole purpose in placing the torpedoes on

the rail was to scare the crew members on the Angleton Switcher. Thus, by his own testimony, Mr. Calloway was not using the torpedoes for any purpose connected with the performance of his duties, but was instead simply playing a prank or practical joke on some fellow employees.[2]

As the Angleton Switcher approached the spot where the torpedoes were located (adjacent to the Amoco Switcher), Fred Bacoum, the engineer on the Amoco Switcher, tried to communicate with Respondent via the radio. However, the radio transmission was of such poor quality that Mr. Bacoum and Respondent were unable to communicate. According to Respondent and Mr. Calloway, Mr. Bacoum then motioned for Respondent to come over to the locomotive of the Amoco Switcher. Just as Respondent reached the ground after leaving the Angleton Switcher on his way to the Amoco Switcher, the wheels of the Angleton Switcher's locomotive detonated the torpedoes.

Respondent subsequently brought this action, claiming that he had sustained a disabling hearing loss as a result of this incident. The trial court awarded judgment in his favor in the sum of $351,500.00.

In response to Special Issues Nos. 1, 3, and 7, the jury found that Missouri Pacific was negligent in placing or in allowing the placement of the torpedoes on the track, that Respondent was on the ground near the torpedoes because of a signal from a Missouri Pacific employee, and that Missouri Pacific failed to provide Respondent with a reasonably safe place to work (App. E). Petitioner contends that there was no evidence to support the submission of those special issues nor to support the jury's findings in response thereto, because there was no evidence that Petitioner's employees were, within the meaning of the FELA, acting in the course and scope of their employment at the time of

[2] The fact that Mr. Calloway's conduct amounted to the simple perpetration of a practical joke has never been disputed by Respondent throughout the course of this litigation, and this interpretation of his conduct was expressly adopted by the Court of Civil Appeals in its opinion. 598 S.W. 2d at 353.

the occurrence in question. Petitioner first raised this contention when it objected to the trial court's charge submitting these Special Issues. The trial court overruled these objections (*see* App. F). Petitioner next raised this complaint in Points of Error Nos. 1, 2, 5, 6, 9, and 10 in its brief in the Court of Civil Appeals (App. G), and each of these Points was overruled. In the Texas Supreme Court, Petitioner raised this contention in Points of Error Nos. 1, 2, 5, 6, 9, and 10 (App. H), but the Texas Supreme Court denied Petitioner's Application for Writ of Error.

In response to Special Issue No. 5, the jury found that the railroad was negligent in failing to discipline its employees for the unauthorized use of torpedoes prior to February 1, 1976. Mr. Calloway testified that the use of torpedoes to play practical jokes had occurred in the past, but he could name only three employees (including the Respondent himself) who had done so. All three of those individuals denied ever having misused a torpedo. Mr. Calloway also testified that he had heard torpedoes go off in Missouri Pacific's yards prior to this incident, and that it is improper to make use of torpedoes in the railroad's yards. Six other Missouri Pacific employees agreed that they had heard torpedoes go off in yards, but, aside from Mr. Calloway, none of the ten Missouri Pacific employees who were called to testify at this case (*including* Respondent) could identify a single Missouri Pacific employee who had ever made unauthorized use of a torpedo prior to this incident. Furthermore, it was explained that outsiders (such as youngsters) are frequently seen trespassing inside the yards, and that the sounding of torpedoes can be attributed to their actions. There was absolutely no evidence adduced at trial indicating that any company official ever had knowledge of any Missouri Pacific employee misusing a torpedo prior to this incident. Therefore, Petitioner objected to Special Issue No. 5 on the ground that there was no evidence to support its submission (App. F), but the trial court overruled that objection. Petitioner's complaints on appeal (Point No. 7 in both the Court of Civil Appeals and the Texas Supreme Court) were likewise overruled.

REASONS FOR GRANTING THE WRIT

I. Course and Scope of Employment.

The Writ of Certiorari should be granted because the Court of Civil Appeals' holding runs contrary to every reported opinion dealing with this subject matter. Unless the judgments of the lower courts are reversed, this will be the first reported case in which a railroad has been held liable under the FELA for acts of horseplay on the part of its employees.

At least until this case, it was recognized as black letter law that the FELA does not make the railroad an insurer against personal injuries suffered by its employees. *See, e.g., Wilkerson* v. *McCarthy,* 336 U.S. 53, 61 (1949). Instead, a railroad is liable only in those cases in which injury to an employee results from the negligence of its employees acting within the course and scope of their employment. *See, e.g., Davis* v. *Green,* 260 U.S. 349, 352 (1922); *Copeland* v. *St. Louis — S.F. Ry.*, 291 F.2d 119, 121 (10th Cir. 1961); *Sheaf* v. *Minneapolis, St. P. & S.S.M. R.R.*, 162 F.2d 110, 113 (8th Cir. 1947).

This Court initially laid down its test for determining whether a railroad employee's act is within the course and scope of his employment in *Davis* v. *Green*, 260 U.S. 349 (1922). In a unanimous opinion authored by Justice Holmes, the Court held that the railroad was not liable under the FELA because the acts of the employee in question were not "done to further the master's businesses." *Id.* at 351. *See also Atlantic Coastline R.R.* v. *Southwell*, 275 U.S. 64 (1927). This Court has never departed from the standard set forth in *Davis* v. *Green* and, even in cases not directly involving a course and scope question, has frequently referred to the phrase "furtherance of the enterprise" as the touchstone for FELA liability. *See, e.g., Hopson* v. *Texaco, Inc.*, 383 U.S. 262, 264 (1966); *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 330 (1958).

In the case at bar, the Court of Civil Appeals simply refused to follow that standard. Instead, brushing aside all contrary

authority and citing no supporting authority (because there is none), the court ruled as follows:

> "It is uncontroverted that the crew of the Amoco Switcher was on duty at the time of the accident, and that the injury resulted from the negligence of one or more of them. [Respondent's] points of error relative to course and scope of employment are therefore overruled." 598 S.W.2d at 354.

Thus, in one fell swoop, the Texas Court of Civil Appeals overruled (or ignored) a continuing line of authority requiring that FELA liability be premised on conduct in furtherance of the railroad's business or enterprise and adopted a simplistic test imposing liability for all acts committed by employees while they are "on duty."

In addition to contradicting the writings of the Supreme Court in this area, the lower courts' ruling runs counter to the decisions of numerous federal courts of appeals and state appellate courts.

Perhaps nowhere is the conflict more evident than with the case of *Goupiel* v. *Grand Trunk Ry.*, 96 Vt. 191, 118 A. 586 (1922), which involved facts virtually identical to those presented in the case at bar. In *Goupiel*, the defendant railroad's fireman had placed a torpedo on a rail in order to play a practical joke on the plaintiff. He then motioned for the engineer to move the locomotive forward over the torpedo. The engineer, aware of the practical joke which the fireman had planned, obeyed the fireman's signal and ran his engine over the torpedo. The sole purpose of both the engineer and the fireman in exploding the torpedo was to startle the plaintiff and make him jump. Affirming an instructed verdict in favor of the railroad, the Vermont Supreme Court ruled that there was no evidence that the fireman and engineer were in the course and scope of their employment:

> This defendant was not an insurer against accidents occasioned by the unwarranted use of these explosives. It was only liable for the negligence of its servants in keeping or handling them when that negligence consisted of some act or omission within the scope of the servant's employment. *It*

> *is not enough that such act or omission occurred within the working hours of the servant, nor that he was at the time on duty.* If the act or omission complained of was done or omitted to carry out some direction of the master, express or implied, *in the furtherance of the work the servant was employed to do*, the master is chargeable for it; if it is done or left undone to effect some purpose of the servant alone, the master is not so chargeable. 111 A. at 587 (emphasis added).

It seems clear that the perpetration of the practical joke in the case at bar in no way "further[ed] the work the [Amoco Switcher crew] was employed to do" and that *Goupiel* would preclude the imposition of liability on Petitioner for such acts. Indeed, the courts which have addressed the question have unanimously ruled that a railroad cannot be held responsible under the FELA for the results of mere pranks played by its employees.

> Railroad employees injured as a result of horseplay or sportive conduct by another employee who have sought to recover for such injuries under FELA have almost uniformly been unsuccessful. It has been the accepted view that horseplay cannot possibly be in the furtherance of the employer's business, and that the employer cannot be held directly negligent for hiring playful employees. 2 Am. Jur. Trials 451.

Copeland v. *St. Louis — S.F. Ry.*, 291 F.2d 119 (10th Cir. 1961), for example, involved a plaintiff who was helping unload railroad ties from a boxcar. While he was in the process of balancing a tie on his shoulder and removing it from the car, a fellow employee who was working inside the car pushed upward on the back end of the tie, as a prank and practical joke. This caused the plaintiff to fall and sustain injuries. The Tenth Circuit upheld the district court's judgment in favor of the railroad, ruling that

> the acts of the fellow employee which caused Plaintiff's injury were wholly outside the scope of his employment, intended only to *further his own interests, and not those of his employer*, and were not chargeable to his employer. *Id.* at 112 (emphasis added).

In *Osment* v. *Pitcairn*, 349 Mo. 137, 159 S.W.2d 666 (1941), *cert. denied*, 317 U.S. 587 (1942) and 320 U.S. 792 (1943), the plaintiff, a railroad employee, was injured when a co-employee playfully seized him around the neck and shoulder and squeezed him so tightly that he lost consciousness, fell to the floor and fractured his skull. The plaintiff filed suit against the receivers of the railroad under the FELA. Ruling that the co-employee's act occurred outside the course and scope of his employment, the Missouri Supreme Court ruled that the trial court should have sustained the defendant's demurrer to the plaintiff's evidence.

> [The] assault being outside the scope of his employment, not in any manner in furtherance of the railroad's business, unauthorized and not directed, the trial court should not have submitted that assignment of negligence to the jury. *Id.* at 668.

In *Blunk* v. *Atchison, T. & S.F. Ry.*, 97 Cal. App.2d 229, 217 P.2d 494 (1950), the plaintiff's co-employee had placed a brake shoe inside the plaintiff's suitcase and had placed a glass tube underneath the suitcase as a roller to allow it to move as if it were not weighted. When the plaintiff reached for the suitcase to take it down from the rack, the heavy load threw him off balance and caused him to fall. The plaintiff brought suit under the FELA, and the trial court awarded a judgment in his favor. In reversing and rendering with directions to enter judgment for the defendant, the California Court of Appeals ruled:

> The placing of the brake shoe in the bag and the roller beneath it was a deliberate act. The practical joker was guilty of negligence, it is true, but it was not negligence for which the employer is responsible. It is, we think, beyond the bounds of reasonable inference to assume that the placing of the objects in and under the bag was done within the course and scope of an employee's duties. 217 P.2d at 495.

In *Popadines* v. *Davis*, 213 App.Div. 9, 209 N.Y. Supp. 689 (1925), a co-employee playfully pulled the plaintiff's cap over his face. When the plaintiff tried to pull the cap up, his feet slipped and he fell. The appellate court ruled that the railroad had no liability under the FELA because the co-employee was not

within the course and scope of his employment. Other authorities for the proposition that a co-employee's horseplay or sportive conduct is outside the course and scope of employment and does not render the railroad subject to liability under the FELA include the following: *Brooks* v. *Washington Terminal Company,* 593 F.2d 1285 (D.C. Cir.), *cert. denied,* 442 U.S. 910 (1979); *Sowards* v. *Chesapeake & O. Ry.,* 580 F.2d 713 (4th Cir. 1978); *Hoyt* v. *Thompson,* 174 F.2d 284 (7th Cir. 1949); *Sheaf* v. *Minneapolis, St.P. & S.S.M. R.R.,* 162 F.2d 110 (8th Cir. 1947); *Lavender* v. *Illinois Central R.R.,* 219 S.W.2d 353 (Mo. 1949); *Reeve* v. *Northern Pacific Ry.,* 114 P. 63 (Wash. 1914).

It is thus abundantly clear that the naked fact that Respondent's co-employees were "on duty" at the time in question is not dispositive of the course and scope question. Instead, the determining factor in FELA cases is whether or not the employees' conduct was in furtherance of the railroad's business. Common sense dictates that the perpetration of a practical joke on a co-employee, especially when that prank potentially involves an element of danger, does nothing to further the railroad's business. This common sense notion has been given the force of law by the numerous cases discussed *supra.* The opinion of the Court of Civil Appeals constitutes a dangerous assault on that rule of law and, unless reversed, will invite other courts to apply a mistaken course and scope standard in FELA cases. The Supreme Court should therefore grant the writ of certiorari, correct the Texas courts' rulings, and provide renewed support for the FELA course and scope test first set forth in *Davis* v. *Green.*

II. Failure to Discipline

Petitioner will make no attempt to hide the fact that the primary reason for granting the writ in this case is the Court of Civil Appeals' erroneous holding on the course and scope issue in direct conflict with several Supreme Court opinions, federal Circuit Court opinions, and state appellate court opinions. The lower court's holding on the failure to discipline issue, however, is equally erroneous and directly conflicts with the decision of

the federal court of appeals in *Brooks* v. *Washington Terminal Company*, 593 F.2d 1285 (D.C. Cir.), *cert. denied*, 442 U.S. 1910 (1979).

Edward D. Calloway, the perpetrator of the practical joke in this case, and, of course, not a company official, testified that the use of torpedoes to play practical jokes had occurred in the past, but each of the three employees he fingered denied having done so. Mr. Calloway also testified that he had heard torpedoes go off in Missouri Pacific's yards prior to this incident, but there was testimony explaining that trespassers are frequently seen inside the yards and that the sounding of torpedoes can be attributed to their actions. In other words, the mere sounding of a torpedo inside the yard does not mean that a Missouri Pacific employee was involved and certainly does not establish misuse of a torpedo by a particular employee who could then be the subject of company discipline. There was absolutely no evidence adduced at trial indicating that any company official ever had knowledge of any Missouri Pacific employee misusing a torpedo prior to this incident.

Mr. Kenneth M. Holloway, a company official, testified in detail regarding the discipline procedure in force at Missouri Pacific. He testified that when a rule violation occurs, the incident is investigated by a Missouri Pacific officer. If the situation warrants, a formal investigation is held, culminating in a hearing at which the employee is represented by a union official. If the formal investigation results in a determination that a rule was violated, then the appropriate type of discipline is ordered. Missouri Pacific investigates every alleged rule violation of which an officer obtains knowledge. However, because only officers can conduct the investigation and issue the discipline, the railroad is obviously unable to investigate those incidents which are not reported to officers. Therefore, if the incident justifying discipline (such as torpedo misuse) is not reported to a company officer, it is impossible for Missouri Pacific to order any discipline for such misuse. Since the record is completely devoid of any evidence of any Missouri Pacific official having knowledge of

an employee misusing a torpedo, there is no evidentiary ground on which the jury could properly base a finding that Missouri Pacific was negligent in failing to issue such discipline. In short, how can Missouri Pacific's officers be negligent in failing to discipline employees for misconduct which those officers had no knowledge was occurring? Obviously, they cannot be.

Precisely this conclusion was reached in *Brooks* v. *Washington Terminal Company*, 593 F.2d 1285, 1289-90 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979), a very recent FELA case in which the court made the following ruling:

> Plaintiff contends that negligence of the defendant could be found from a failure of the company to enforce its rule against use and possession of drugs. We cannot agree. Before failure to enforce a rule could give rise to liability, *there must be evidence*, as in the case cited by plaintiff, *of prior disregard of the rule, which would "warrant a finding of the defendant's knowledge of the practice* and of its negligence in the performance of its duty to enforce the rule." . . . There was no such evidence in this case. *Id.* at 1289-90 (emphasis added).

In the case at bar, there is absolutely no evidence of "prior disregard" of the torpedo rules. The mere sounding of torpedoes in yards where they could have been set off by anybody (including non-employees) does not rise to the level of constituting evidence of an actual rule violation. Moreover, there is nothing to "warrant a finding of [Missouri Pacific's] knowledge of the practice," as there is in fact a complete dearth of evidence that any company official knew of such actions. Therefore, the holding in the *Brooks* case directly conflicts with the ruling of the Texas Court of Civil Appeals and compels the conclusion that there is no evidence in the case at bar to support a finding of negligent failure to discipline.

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on January 20, 1981, three (3) copies of the foregoing Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to J. Donald Bowen, counsel of record for Respondent, at 2800 Two Houston Center, 909 Fannin Street, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

.....

BEN G. SEWELL

APPENDIX A

Opinion of Court of Civil Appeals

No. A2356

Affirmed, and Opinion filed April 2, 1980.

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant*

v.

LOY D. ALCORN, *Appellee*

APPEAL FROM THE 149TH DISTRICT COURT
OF BRAZORIA COUNTY

This Federal Employers' Liability Act (FELA) suit resulted in a jury verdict and judgment for the appellee in this suit complaining of a hearing impairment which the jury found was the result of a prank perpetrated by his fellow employees. We affirm.

Appellee, Loy D. Alcorn, a conductor on the Missouri Pacific Railroad's "Angleton Switcher" on February 1, 1976, was alighting from the train in a response to a hand motion of the engineer of another train, the "Amoco Switcher" to come to his locomotive, when he was subjected to the loud explosion of one or more torpedoes, or warning devices, which had been placed on the track as a practical joke by the fireman of the Amoco Switcher. He suffered much discomfort thereafter but continued to work until April 1978, when the appellant's chief physician ordered his removal from service because his hearing did not meet the minimum standards for continued employment.

The jury found that the defendant railroad failed to provide appellee with a safe place to work; it was negligent in allowing the placement of the torpedoes on the track; it was negligent in its failure to discipline its employees for the unauthorized use of torpedoes prior to the date of the accident; appellee was on the ground near the explosion as the result of a signal given to him by an employee of the defendant, such act of the employee being

negligent; and that each of these acts or omissions was a cause, in whole or in part, of appellee's injuries.

Appellant brings forward numerous points of error, foremost of which are allegations that each of the jury's findings set out above were erroneous in that there was no evidence that appellant's employees were acting within the course and scope of their employment at the time of the detonation of the torpedoes. In support of this view, appellant urges that the act of placing the torpedoes on the track was not committed for the purpose of furthering the railroad's business. Additionally, if the other employees of the Amoco Switcher knew that the torpedoes had been placed on the rail as a joke, then their acquiescence would amount to participation, and they, too, would be outside the course and scope of their employment. Also, if the engineer of the Amoco Switcher signaled to the appellee to come over to his locomotive it was for the purpose of offering him some clothes for his children, and, thus, likewise was beyond the course and scope of the engineer's employment.

A Texas appellate court which is reviewing the sufficiency of the evidence in a case brought under the FELA, 45 U.S.C.A. 51 *et seq.*, is required to adhere to the federal rule of evidence annunciated in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957), that if there be some creditable evidence to support the verdict nothing further is required. Event the slightest employer negligence that played any part in producing the injury complained of will suffice. "Stated another way, once the appellate court determines that the verdict is supported by some evidence about which reasonable minds could differ, the appellate court's function is exhausted." *Texas and Pacific Railway Company* v. *Roberts*, 481 S.W.2d 798, 800 (Tex. Sup. 1972). The FELA makes the railroad liable "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or *employees* of such carrier. . . ." U.S.C.A. §51. (Emphasis added). In interpreting this act the United States Supreme Court used the following language:

> . . . it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages. *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799, 803.

Judged by the standards set out above, therefore, if the appellee in this case introduced some creditable evidence that he was injured because of the negligence of a co-worker who was at the time under the railroad's control, this court's review is at an end. It is uncontroverted that the crew of the Amoco Switcher was on duty at the time of the accident, and that the injury resulted from the negligence of one or more of them. Appellant's points of error relative to course and scope of employment are therefore overruled.

Appellant further complains that Special Issue Number One did not inquire as to whether appellant was negligent, and that issue could have been answered in the affirmative even if the jury did not believe that appellant was negligent. The issue was framed as follows:

> INSTRUCTION NO. 1: You are instructed that it was the continuing duty of the Railroad, acting through its agents, officers and employees, at the time and place in question, to use ordinary care under the circumstances in furnishing Plaintiff with a reasonably safe place to work. This does not mean, of course, that the Railroad is an insurer of the safety of Mr. Alcorn. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be

performed is reasonably safe. The degree of care required to be exercised depends upon the risk or danger involved under the circumstances.

SPECIAL ISSUE NO. 1: Do you find from a preponderance of the evidence that the defendant railroad failed to provide plaintiff with a reasonably safe place to work on the occasion in question?

Answer "We do" or "We do not".

ANSWER: We do.

This instruction set forth the railroad's duty to exercise ordinary care under the circumstances, and failure to use ordinary care is the definition of negligence. The instruction is in accord with the mandate of Rule 277, Texas Rules of Civil Procedure, that "the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict. . . ." Appellant's point of error is ill-founded.

The final four of appellant's points of error deal with asserted error of the trial court in admitting or excluding certain testimony. We have carefully considered each of these points and find that error, if any, was harmless in that the rulings complained of were not calculated to cause nor did they probably cause the rendition of an improper judgment in this case. Rule 434, TEX. R. CIV. P.

The judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed April 2, 1980.

Panel consists of Chief Justice Brown and Associate Justices Miller and Salazar.

APPENDIX B

Judgment of Court of Civil Appeals

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1979, present Chief Justice Brown and Associate Justices Miller and Salazar

In the cause

No. A2356

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee.*

From Brazoria County
Tr Ct #78F0129
Opinion by AJ Miller

the following judgment was rendered on April 2, 1980:

"This cause, being an appeal from the judgment rendered by the court below and entered on August 2, 1979, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court be affirmed in all things. It is further ordered that the appellant, Missouri Pacific Railroad Company, and its surety, St. Paul Fire & Marine Insurance Company, pay all costs incurred by reason of its appeal. It is further ordered that this decision be certified below for observance."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of judgment entered herein by this Court in the above entitled

and numbered cause as appears of record in Minute Book 2, Page 578.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 24th day of December A. D. 1980.

THELMA MUELLER, Clerk

By: .....

APPENDIX C

Order of Court of Civil Appeals Overruling Motion for Rehearing

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1979, present Chief Justice Brown and Associate Justices Miller and Salazar

In the cause

No. A2356

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee,*

From Brazoria County
Tr Ct #78F0129
Opinion by AJ Miller

the following order was rendered on April 23, 1980:

"It is ordered that appellant's motion for rehearing be overruled."

I, THELMA MUELLER, Clerk of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at the City of Houston, hereby certify that the foregoing is a true copy of order entered herein by this Court in the above entitled and numbered cause as appears of record in Minute Book 2, Page 589.

IN WITNESS WHEREOF, I, hereunto set my hand and affix the seal of said Court at Houston this 24th day of December A. D. 1980.

THELMA MUELLER, Clerk

By: .....

APPENDIX D

Orders of the Supreme Court of Texas Refusing Application for Writ of Error and Overruling Motion for Rehearing

In the Supreme Court of Texas

No. B-9463

July 16, 1980

MISSOURI PACIFIC
RAILROAD COMPANY

v.

LOY D. ALCORN

From Brazoria County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Missouri Pacific Railroad Company and its surety, St. Paul Fire & Marine Insurance Company, pay all costs incurred on this application.

No. B-9463

October 22, 1980.

MISSOURI PACIFIC
RAILROAD COMPANY

v.

LOY D. ALCORN

From Brazoria County,
Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 24th day of December, 1980.

GARSON R. JACKSON,
Clerk

By ....., Deputy.

APPENDIX E

Excerpts from Charge of the Court

No. 78F0129

LOY D. ALCORN

v.

MISSOURI PACIFIC
RAILROAD COMPANY

In the District Court of
Brazoria County, Texas
149th Judicial District

CHARGE OF THE COURT

* * *

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the defendant railroad failed to provide plaintiff with a reasonably safe place to work on the occasion in question?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the defendant railroad, acting through its employees, was negligent in placing or in allowing the placement of the torpedoes on the track at the time and on the occasion made the basis of this suit?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the railroad was negligent for its failure to discipline, in any manner,

its employees for the unauthorized use of torpedoes on the Kingsville Division prior to February 1, 1976?

Answer "We do" or "We do not."

ANSWER: .....

* * *

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that Mr. Alcorn was on the ground near where the torpedoes exploded because of the request, direction or signal given to him by an employee of defendant?

Answer "We do" or "We do not."

ANSWER: .....

* * *

APPENDIX F

Excerpts from Defendant's Objections and Exceptions to the Charge of the Court

No. 78F0129

LOY D. ALCORN	In The District Court
v.	149th Judicial District
MISSOURI PACIFIC RAILROAD COMPANY	Brazoria County, Texas

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE CHARGE OF THE COURT

* * *

VII.

Defendant objects to Special Issue No. 5 for the reason that there is no evidence to warrant its submission nor to support an affirmative answer to it because there is no evidence that any official or officer of the railroad ever had notice of an employee using torpedoes in an unauthorized manner on the Kingsville Division prior to February 1, 1976.

* * *

X.

Defendant further objects to Special Issues No. 8, No. 7, No. 5, No. 3 and No. 1 on the basis that there is no evidence that any of the employees were in the course and scope of their employment at the time of the conduct inquired about.

MR. HOLLOWAY: That is all.

THE COURT: All right, the objections are all overruled.

THE STATE OF TEXAS
COUNTY OF BRAZORIA

I, John Waide, Official Court Reporter, 149th Judicial District of Texas, do hereby certify I was present in my official capacity at the time counsel for defendant dictated to me defendant's objections and exceptions of the court's charge in Cause No. 78F0129, Loy D. Alcorn vs. Missouri Pacific Railroad Company, on the docket of the 149th Judicial District of Texas, same being on the 19th day of July, 1979, and I reported in shorthand such dictation.

I further certify the foregoing pages numbered 1 through 6, inclusive, contain and constitute a full, true and correct transcript of my shorthand notes so taken as aforesaid.

WITNESS my hand this 13th day of December, 1979.

/s/ John Waide

APPENDIX G

Excerpts from Brief of Appellant Missouri Pacific Railroad Company in Court of Civil Appeals

No. A-2356

IN THE

Court of Civil Appeals

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

HOUSTON, TEXAS

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant,*

v.

LOY D. ALCORN, *Appellee.*

BRIEF OF APPELLANT MISSOURI PACIFIC RAILROAD COMPANY

---

* * *

POINTS OF ERROR

Point of Error No. 1

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 9)

Point of Error No. 2

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO

SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 15)

* * *

Point of Error No. 5

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 3 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 10)

Point of Error No. 6

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 3 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH ANSWER. (TR 16)

Point of Error No. 7

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 5 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT ANY OF APPELLANT'S OFFICERS HAD KNOWLEDGE OR NOTICE OF THE UNAUTHORIZED USE OF TORPEDOES BY ITS EMPLOYEES ON THE KINGSVILLE DIVISION PRIOR TO FEBRUARY 1, 1976. (TR 10)

* * *

Point of Error No. 9

THE DISTRICT COURT ERRED IN SUBMITTING SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT APPELLANT'S EMPLOYEES WERE

ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 11)

Point of Error No. 10

THE DISTRICT COURT ERRED IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER IN RESPONSE TO SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 16)

* * *

APPENDIX H

Excerpts from Application for Writ of Error in Supreme Court of Texas

No. B-9463

IN THE
Supreme Court of Texas

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*
v.
LOY D. ALCORN, *Respondent.*

APPLICATION FOR WRIT OF ERROR

* * *

POINTS OF ERROR

Point of Error No. 1

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR. 9)

Point of Error No. 2

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 1 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 15)

* * *

Point of Error No. 5

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 3 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 10)

Point of Error No. 6

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER TO SPECIAL ISSUE NUMBER 3 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SUCH ANSWER. (TR 16)

Point of Error No. 7

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 5 TO THE JURY BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT ANY OF PETITIONER'S OFFICERS HAD KNOWLEDGE OR NOTICE OF THE UNAUTHORIZED USE OF TORPEDOES

BY ITS EMPLOYEES ON THE KINGSVILLE DIVISION PRIOR TO FEBRUARY 1, 1976. (TR 10)

* * *

Point of Error No. 9

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN SUBMITTING SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE SUBMISSION OF SAID ISSUE AND, IN PARTICULAR, BECAUSE THERE WAS NO EVIDENCE THAT PETITIONER'S EMPLOYEES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AT THE TIME OF THE OCCURRENCE IN QUESTION. (TR 11)

Point of Error No. 10

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT DID NOT ERR IN BASING ITS JUDGMENT ON THE JURY'S AFFIRMATIVE ANSWER IN RESPONSE TO SPECIAL ISSUE NUMBER 7 BECAUSE THERE WAS NO EVIDENCE TO SUPPORT SAID ANSWER. (TR 16)

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

NO. 80-1242

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

LOY D. ALCORN,
Respondent

On Appeal from Texas Court of Civil Appeals Fourteenth Supreme Judicial District of Texas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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NO. 80-1242

MISSOURI PACIFIC RAILROAD COMPANY,
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v.

LOY D. ALCORN,
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On Appeal from Texas Court of Civil Appeals Fourteenth Supreme Judicial District of Texas

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether there was any evidence to support the Jury findings that railroad employees, acting in the scope of their employment, were negligent.

2. Whether there was any evidence to support the Jury finding that the railroad was negligent for failing to discipline its employees for prior rule violations.

STATEMENT OF THE CASE

This case does not turn upon the definition of "employee" as used in 45 U.S.C., § 51, or upon the restrictiveness or liberality to be applied to the scope of employment. Neither does this case rise or fall upon the railroad's responsibility under the F.E.L.A. for an intentional act involving a prank or practical joke. If it did, sharp issue would be taken with Petitioner's statements of "black letter law" and restrictive cases cited which do not fairly portray the current attitude of appellate courts to broaden the scope of employer liability.[1]

Instead, this case simply involves a review of the testimony to determine whether there was any evidence to support one or more of the four separate sets of negligence and causation issues found by the jury in favor of Respondent Alcorn. The railroad, for obvious reasons, has chosen to focus on certain carefully selected sections in the opinion of the appellate court rather than upon the entire opinion and the facts which form the basis for the court's ruling. Those facts warrant inspection by this Court.

On February 1, 1976, the crew of the Amoco Switcher was required to wait with its train on the main line until the Angleton Switcher, coming from the opposite direction, could reach the siding and clear the main line. While waiting, the fireman on the Amoco crew, Mr. Calloway, placed multiple torpedoes on the rail of the siding over

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1. *See Baker v. Baltimore & Ohio R.R. Co.*, 502 F.2d 638, 642 (6th Cir. 1974) where the court argued that the F.E.L.A. is not subject to traditional interpretations of course and scope of employment and that the better rule would be to make the railroad liable "for all negligent acts by employees which occur during the hours of employee's working day on the employer's premises."

which the Angleton Switcher would pass. Such conduct, regardless of motivation, was clearly in violation of the Railroad's operating and safety rules. The placement of these torpedoes, conceded by all to be dangerous instrumentalities, was done in the presence and full sight of the other Amoco crew members, including Engineer Baucom and Conductor Peavy. Rule 107 of Petitioner's operating rules makes both men jointly responsible for seeing that their crew follows the company's rules and that the work is done in a safe and proper manner. Both men denied being participants in the prank. Both conceded their supervisory positions required an attempt to stop or prevent such a violation of the rules. Unfortunately, neither said nor did anything to halt or discourage the prank.

As the Angleton Switcher approached, Engineer Baucom signaled Mr. Alcorn to leave the relative safety of his engine, which caused him to reach the ground between the two trains at the time and place where the series of explosions occurred. There was testimony that he knew the torpedo placement when he gave the signal, yet he denied involvement in the prank. Mr. Alcorn's hearing was permanently damaged to the extent that he can no longer work for the railroad.

This incident was not an isolated occurrence. The misuse of torpedoes had progressed to the point that it was past practice in the Kingsville Division. It literally "happened all the time," according to Engineer Baucom. Every railroad employee, except Mr. Holloway, the Company's designated official representative, testified that in the past they had heard torpedoes explode in the yards where they did not belong. One employee stated he did not report such occurrences to company officials because

he assumed they already knew about it since the torpedoes were so loud when exploded they could be heard by anyone in the yard area.

Mr. Holloway conceded that the only way to stop horseplay involving rule violations that endangered others was to discipline those involved. In the seventeen years before this event, not one single employee was disciplined in any fashion for the "many, many times" these violations occurred. Not one safety meeting was called or one bulletin or memorandum written and posted to warn the employees that such conduct would not be tolerated.

Mr. Calloway testified he had no fear of being fired for his violation of the rules on this occasion. His confidence was justified. The company officials learned of his participation immediately following the event, but took no steps to discipline or even reprimand him for violating its rules. Nor did the company punish the engineer and conductor for their failure to properly supervise their crew.

ARGUMENT

The standards of review by this Court of a favorable jury verdict for a railroad employee such as Mr. Alcorn under the F.E.L.A. are extremely limited. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). There must be "a complete absence of probative facts to support the conclusion reached" to create reversible error. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Mr. Alcorn is to be given the benefit of any doubt in making the evidentiary determination. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116 (1963). Congress intended for the jury to determine these cases, and that tribunal

role has been carefully guarded by this Court through the years. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943); *Rogers, supra* at 510; *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649 (1947) (jury has choice of conflicting versions of how the accident happened, who was telling the truth and inferences drawn from uncontroverted facts).

This Court recognized that the F.E.L.A. was a distinct departure from the rules of common law. *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958). In *Sinkler* the rationale for the liberal purpose of the Act was clearly established. The railroads had the economic resources to bear the burden of injury caused by the negligence of a co-employee and justice demanded the protection of those involved in the common pursuit. In *Baker v. Baltimore & Ohio R.R. Co., supra* at 642, the court held that scope of employment included both actual service and "those things necessarily incident thereto." This Court recognized resting while on duty as falling within that definition. *North Carolina R.R. v. Zachary*, 232 U.S. 248 (1914).

The railroad has concentrated its focus on Mr. Calloway and his intentional activity[2] and has chosen to ignore the conduct of its other employees who were not engaged in the practical joke. As previously seen, Alcorn's primary complaint was the failure of the Amoco crew's conductor and engineer to follow Rule 107.

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2. Petitioner has not attempted to distinguish the line of cases beginning with this Court's decision in *Lillie v. Thompson*, 332 U.S. 459 (1947) and continuing with *Harrison v. Missouri Pacific R.R. Co.*, 372 U.S. 248 (1963) which extended the railroad's responsibility to foreseeable dangers from intentional or criminal misconduct, which did not necessarily occur in furtherance of the employer's business. *Slaughter v. Atlantic Coast Line R.R. Co.*, 302 F.2d 912, 916 (D.C. 1962).

A somewhat similar situation existed in *Claris v. Oregon Short Line,* 51 P.2d 217 (Idaho, 1935), *cert. den.* 297 U.S. 714 (1935). In that case an employee put water in a grease gun as a joke. Plaintiff's supervisor knew the water was in the gun, yet allowed the plaintiff to use it, thereby causing injury. The court rejected the argument that the supervisor was not in the course and scope of employment and upheld a jury finding that the railroad failed to furnish plaintiff with a safe tool.

It must be conceded by the railroad that Peavy and Baucom were paid to supervise the crew and see that the rules were followed. Their duty to supervise according to the rules arose from the work they were employed to do. A similar situation occurred in *Mileski v. Long Island R.R. Co.,* 449 F.2d 1169 (2d Cir. 1974) where the court upheld negligence findings predicated on the railroad supervisors' laxity in enforcing the company's rules requiring goggles to be worn. The instant event occurred during normal work hours on the railroad premises while the Amoco crew was forced to wait to proceed with its work. The only thing that could possibly have removed them from the control of the railroad would have been their participation in the prank. Both supervisors flatly denied involvement.

Since the negligence of both supervisors in allowing the placement of the torpedoes grew out of their work, the test referred to by Petitioner in *Goupiel v. Grand Trunk Ry.,* 96 Vt. 191, 118 A. 586 (Vt. 1922) is satisfied as to them. It is immaterial to examine more recent opinions such as *Ira S. Bushey & Sons, Inc. v. United States,* 398 F.2d 167 (2d Cir. 1968) which greatly expand an employer's vicarious liability. The most restrictive definition of course and scope of employment would cover Baucom and Peavy in this case.

The railroad complains bitterly about the language used in the appellate court's decision. Such complaint is ill-founded. The court below held, in accordance with *Sinkler*, that any evidence of injury caused by the negligence of "a co-worker who was at the time under the railroad's control" would require affirmance.[3] Obviously, an employee engaged in a purely personal unforeseeable endeavor would not be under the control of his employer. *Brooks v. Washington Terminal Co.*, 593 F.2d 1285 (D.C. 1979). Control of the employer would extend, however, under the facts of this case, to those employees (Peavy and Baucom) whose negligence arose out of their failure to perform the duties they were hired to do. The court's holding, therefore, is correct under the evidence.

FAILURE TO DISCIPLINE

A completely independent basis of recovery was the finding that the railroad was negligent for failing to discipline its employees prior to this episode. The testimony cited earlier at least created a fact issue as to whether the railroad had habitually disregarded the rules relating to torpedo misuse. In *Descoteau v. Boston & Maine R.R.*, 140 A.2d 579, 583 (N.H. 1958) the testimony revealed ample evidence of the common use of kerosene by employees to start fires over a period of years in violation of the company's rule. The court held that habitual disregard of the rule by employees warranted a finding that the railroad knew of the practice and was negligent for not enforcing the rule.

Whether the railroad had actual notice, as the excluded testimony of Mr. Darrington indicates,[4] or constructive

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3. See opinion, Petitioner's brief, Appendix A at A-3.

4. Mr. Darrington testified on a Bill of Exceptions that he knew of rare instances of torpedo misuse while he was a company official, but no discipline resulted.

knowledge based upon the repetitious violation of the rules over the years, the evidence warrants the finding of negligence. The jury rejected the company's attempt to claim trespassers or vandals were setting the torpedoes. Instead, the evidence supported the belief by the jury that the railroad simply looked the other way when it came to its employees playing with torpedoes.

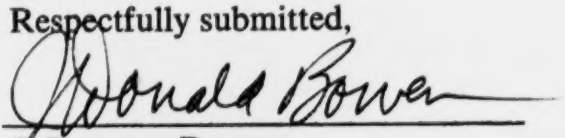
SUMMARY

The verdict of the trial court is on sound footing in several areas involving evidence of both employee negligence under the *respondeat superior* doctrine and direct negligence for the company's failure to discipline. Therefore, the verdict must be affirmed. Additionally, the language of the Court of Civil Appeals' opinion, when read in its entirety in light of the evidence, accurately states the law as it has long been recognized in F.E.L.A. cases.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 1981, three copies of this Brief in Opposition to Petition for Writ of Certiorari were mailed, by first class mail, postage prepaid, to Ben G. Sewell, Gordon A. Holloway, and Claude R. Treece of Sewell & Riggs, 900 Capital National Bank Building, Houston, Texas 77002, counsel for Petitioner. I further certify that all parties required to be served have been served.

J. Donald Bowen

J. DONALD BOWEN

NO. 80-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

v.

LOY D. ALCORN,
Respondent

On Appeal From The Court of Civil Appeals For The Fourteenth Supreme Judicial District of Texas

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. COURSE AND SCOPE OF EMPLOYMENT

Respondent commences his legal argument with a recitation of well-worn truisms concerning the reviewability of fact findings in FELA cases. Those principles and the cases cited by Respondent are simply not pertinent. This case does not involve hotly disputed fact questions—indeed, there is virtually no dispute as to the conduct of the various railroad employees involved in this incident.

Petitioner[1] simply contends that, given the undisputed fact that this accident involved nothing more than the perpetration of a practical joke, there was as a matter of law no evidence that the employees were acting within the course and scope of their employment. The playing of a practical joke cannot conceivably be in furtherance of the railroad's business and thus cannot fall within the standard for course and scope of employment in FELA cases laid down by this Court in *Davis v. Green,* 260 U.S. 349, 351 (1922),[2] and followed in numerous subsequent cases. The continuing validity of the *Davis v. Green* standard is in fact thoroughly documented in one of the principal cases relied upon by Respondent. *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958), was not a horseplay case, but instead involved the question whether the plaintiff, in performing certain switching operations, was an "agent" of the defendant railroad. Within the course of less than two pages of its opinion, the *Sinkler* Court used phraseology virtually identical to the *Davis v. Green* standard no less than eight times: "engaged in the enterprise," "engaged in the common endeavor," "furtherance of the enterprise," "in the common pursuit," "further the task of the respondent's enterprise," "part of the respondent's total enterprise," "engaged in his regular work on the respondent's car," "furthering the operational activities of respondent," and "performing . . . operational activities of his employer."

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1. A listing of all of Petitioner Missouri Pacific Railroad Company's parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates is contained in the Petition for Writ of Certiorari at ii, n.1.

2. It is interesting to note that nowhere in his brief does Respondent even mention *Davis v. Green,* nor does he ever attempt to distinguish it or its considerable progeny.

356 U.S. at 330-32. In short, conduct "in furtherance of the railroad's business" has been the touchstone for FELA liability since the decision in *Davis v. Green* and, as indicated by the above language in *Sinkler* and by the numerous cases cited by Petitioner in its Petition for Writ of Certiorari (at 5-9), continues to be the appropriate standard.

Respondent cites *Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638 (6th Cir. 1974) as "portray[ing] the current attitude of appellate courts to broaden the scope of employer liability." Respondent's Brief at 2. Respondent goes on to assert that the *Baker* court "argued" that the "better" course and scope rule in FELA cases would be "to make the railroad liable 'for all negligent acts by employees which occur during the hours of the employee's working day on the employer's premises.' " Respondent's Brief at 2, n.1. This assertion on the part of Respondent stretches *Baker* far beyond the language actually used by the Sixth Circuit. Instead, the *Baker* court merely suggested, in a footnote, that a more liberal rule in FELA cases *might* extend liability to all acts committed during working hours. 502 F.2d at 642, n.3. The court twice pointed out in that same footnote that the question as to the course and scope of employment test had not been preserved for appeal and was not before the court. *Id.* In addition, the *Baker* court expressly noted that its case did not involve an employee's "sportive" act and deferred to the rulings of several cases cited by Petitioner as setting forth the controlling rule in such cases. 502 F.2d at 641-42, n.2. In short, the comment by the *Baker* court in the margin of its opinion concerning the possible liberality of the course and scope test must be taken as rank dictum in an opinion involving a factual context

completely different from that presented in the case at bar and so distinguished by the *Baker* court itself.[3]

For the first time in the course of this litigation, Respondent introduces the argument that the railroad should be held liable for acts of intentional or criminal misconduct, even if those acts do not occur in furtherance of the railroad's enterprise. Respondent's Brief at 5, n.2. The first case cited by Respondent, *Lillie v. Thompson*, 332 U.S. 459 (1947), is not a course and scope case at all, as it involved injuries to the plaintiff committed by an assailant who was not an employee of the railroad. The question in *Lillie* simply concerned the duty of the railroad to protect a 22-year old female employee who worked the graveyard shift as a telegraph operator in an isolated part of the railroad's Memphis yard. A similar situation was presented in the second case cited by Respondent, *Harrison v. Missouri Pacific R.R.*, 372 U.S. 248 (1963). Although the assault in *Harrison* was com-

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3. Respondent's misplaced reliance on *Baker* is further documented by that court's observation that the scope of employment includes both actual service and "those things necessarily incident thereto." *Id.* at 642. The act complained of in *Baker* was a co-employee's "removing his coat from the candy machine while forgetting about the pistol, *in preparation for inspecting a railroad car.*" *Id.* at 643 (emphasis added). Thus, the *Baker* court simply held that when a co-employee puts on his jacket in preparation for inspecting a railroad car pursuant to orders from his supervisor, he is performing an act "necessarily incident" to actual service. It is difficult to imagine how fireman Calloway's act in the case at bar of placing torpedoes on the rail for the purpose of playing a practical joke was "necessarily incident" to his actual service. A similar analysis applies to another case cited by Respondent, *North Carolina R.R. v. Zachary*, 232 U.S. 248 (1914), wherein the Court noted that there was "nothing to indicate" that the employee's act "was inconsistent with his duty to his employer." *Id.* at 260. The employee's act in *Zachary* merely consisted of briefly visiting his boarding house shortly before departing on his run, having just prepared his engine for that purpose. Moreover, he was still within the limits of the railroad yard at the time of the accident.

mitted by a co-employee, the railroad's liability did not turn on the conduct of the assailant, but was instead based on the railroad's duty to protect against such conduct in light of prior threatening behavior.[4] The third case cited by Respondent, *Slaughter v. Atlantic Coastline R.R.*, 302 F.2d 912 (D.C. Cir. 1962), stands for precisely the opposite principle from that for which it is cited. In reversing the district court's dismissal for failure to state a claim, the Court of Appeals held that the act of the railroad's inspector in causing the plaintiff to be arrested could be a basis for liability under the FELA, but went on to state that "[o]f course, no recovery may be had *unless the tort was 'committed in the course of the discharge of* [*the inspector's*] *duties and in the furtherance of the work of the employer's business.'*" *Id.* at 916 (emphasis added).[5] Thus, *Slaughter* merely con-

4. While *Lillie* and *Harrison* thus shed absolutely no light on the course and scope question, they do have certain implications regarding the failure to discipline issue in this case. Both cases subjected the railroad to liability because of the railroad's actual knowledge of the threatening situation. In *Lillie*, the railroad "was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury." 332 U.S. at 461-62. In *Harrison*, the railroad's roadmaster had warned the plaintiff of the assailant's reputation as a troublemaker and had received subsequent complaints from the plaintiff regarding the assailant's misconduct. 372 U.S. at 249. In short, both cases involved actual knowledge by railroad officers of the dangerous conditions, while Respondent in the case at bar fell far short of establishing any such actual knowledge. *See* Petition for Certiorari at 4, 10-11, and *infra* at 8-10.

5. A similar ruling would obtain in cases of "excessive discipline" in which an overwrought supervisor carries his discipline of an employee to the point of actual assault. *See, e.g., Bocian v. Union Pacific R.R.*, 137 Neb. 318, 289 N.W. 372 (1939); *Baker v. Chicago, B. & Q. R.R.*, 327 Mo. 986, 39 N.W.2d 535 (1931). *See generally* Annot., 8 A.L.R. 3rd 442, 444-45, 447-450 (1966). This Annotation also discusses the rule of so-called "direct negligence," subjecting the railroad to liability for injuries resulting from its hiring a danger-

stitutes additional authority for the continuing viability of the rule in *Davis v. Green.*

Respondent next attempts to hinge liability on the failure of the conductor and engineer on the Amoco switcher to prevent fireman Calloway from carrying out his practical joke. Although the evidence was disputed as to whether or not the engineer and conductor knew of fireman Calloway's actions, it does not matter which version of the facts is believed. If they were not aware of his conduct, their failure to prevent the joke obviously cannot have been negligence. On the other hand, if the engineer and conductor were aware that Calloway had placed the torpedoes on the rail, they had to know that he had no legitimate railroad purpose for doing so. Their failure to stop Calloway would thus have amounted to acquiescence and implicit participation in his practical joke. Respondent's attempt to bootstrap an argument based on this failure of the "supervisory" crew members ignores the holdings of no liability in many FELA cases involving horseplay that *did* occur in the presence of supervisory personnel. *See, e.g., Sheaf v. Minneapolis, St. P. & S.S.M. R.R.,* 162 F.2d 110 (8th Cir. 1947) (engineer present); *Kutz v. Terminal R.R. Association,* 367 S.W.2d 55 (Mo. App. 1963) (foreman of crew present); *Goupiel v. Grand Trunk Ry.,* 96 Vt. 191, 118 A. 586 (1922) (engineer present); *Galveston, H. & S.A. Ry. v. Currie,* 100 Tex. 136, 96 S.W. 1073 (1906) (supervisor of roundhouse present).[6]

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ous employee. *Id.* at 446, 454-61. The case at bar contains no allegations or evidence to support liability on a "direct negligence" theory.

6. Both of the cases cited by Respondent in this connection are distinguishable. *Claris v. Oregon Shortline R.R.,* 51 P.2d 217 (Ida.), *cert. denied,* 297 U.S. 714 (1935), did not involve a failure to pre-

In sum, Respondent's brief in no way diminishes the reasons advanced by Petitioner for granting the writ in this case. Indeed, the various contentions raised by Respondent should if anything encourage this Court to grant the writ and clarify an important area of federal law on which numerous other courts have written without the benefit of substantial guidance. After Justice Holmes initially set forth the *Davis v. Green* "furtherance of the enterprise" test, numerous courts have considered related questions in a variety of factual contexts. Their opinions have varied from straightforward adherence to the *Davis v. Green* rule[7] to actually questioning the continuing validity of that standard.[8] The Texas court in the case at bar managed to avoid entering the debate regarding the propriety and applicability of the *Davis v. Green* test, but its holding clearly constitutes a rejection of that

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vent a practical joke. Instead, the plaintiff's supervisor supplied the plaintiff with the grease gun and directed him to use it. Thus, *Claris* at least involved a situation where the supervisor was performing an act ostensibly intended to further the railroad's enterprise—i.e., furnishing the grease gun—while fireman Calloway's conduct in placing the torpedoes for the purpose of perpetrating a practical joke was not "mixed" with any intent to perform a legitimate railroad function. *Mileski v. Long Island R.R.*, 499 F.2d 1169 (2d Cir. 1974), was neither a practical joke case nor a course and scope of employment case, but simply involved a negligent failure to furnish safety goggles.

7. *See, e.g., Sowards v. Chesapeake & O. Ry.*, 580 F.2d 713, 715 (4th Cir. 1978); *Copeland v. St. Louis-San Francisco Ry.*, 291 F.2d 119, 121 (10th Cir. 1961); *Sheaf v. Minneapolis, St. P. & S.S.M. R.R.*, 162 F.2d 110, 113 (8th Cir. 1947); *Hoyt v. Thompson*, 174 F.2d 284, 285 (7th Cir. 1949); *Blunk v. Achison, T. & S.F. Ry.*, 97 Cal. App. 2d 229, 217 P.2d 494, 497 (1950); *Osment v. Pitcairn*, 349 Mo. 137, 159 S.W.2d 666, 668 (1941), *cert. denied*, 317 U.S. 587 (1942) and 320 U.S. 792 (1943).

8. *See Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172, n.8 (2d Cir. 1968); *cf. Baker v. Baltimore & O. R.R.*, 502 F.2d 638, 641-42, n.2 & 3 (6th Cir. 1974).

rule. Therefore, the Supreme Court should take this opportunity to correct the holding of the Court of Civil Appeals and enunciate the correct course and scope standard to be followed in FELA cases.

II. FAILURE TO DISCIPLINE

In his Statement of the Case, Respondent uses the terms "torpedo misuse" and "rule violation" as if they were interchangeable. In fact, they are not. A "rule violation" occurs when a Missouri Pacific *employee* misuses a torpedo. But torpedo misuse can also result, and under the evidence frequently *did* result, from the conduct of outsiders. Thus, testimony that torpedoes had been heard to explode in the yards did not constitute evidence of torpedo misuse by Missouri Pacific employees. This crucial distinction renders inapplicable the single case relied upon by Respondent, *Descoteau v. Boston & Maine R.R.*, 140 A.2d 579 (N.H. 1958), in which the court's opinion details the extensive evidence of kerosene misuse *by employees* over a period of many years. *Id.* at 582-83. Because there was no such evidence in the case at bar, the holding in *Brooks v. Washington Terminal Company*, 593 F.2d 1285, 1289-90 (D.C. Cir.), *cert. denied*, 442 U.S. 910 (1979), controls:

> "Before failure to enforce a rule could give rise to liability, there must be evidence of prior disregard of the rule which would warrant a finding of the defendant's knowledge of the practice. . . ."

See also Cuddy v. Western Maryland Ry., 229 F.Supp. 443, 445 (Md. P.A. 1963), *aff'd per curiam*, 332 F.2d 371 (3d Cir. 1964):

> "There was no evidence that the company knew or had reason to know that firearms were on the company's trains in violation of the rule. . . . [T]he plaintiff utterly failed to produce any evidence whatever of knowledge on the part of the defendant through its supervisory officers of the carrying of firearms by its employees on freight trains contrary to Rule 25(h). Under such circumstances there is no basis on which negligence could be imputed to this defendant. . . ."

Cf. Atlantic Coastline R.R. v. Southwell, 275 U.S. 64 (1927).

Contrary to the holdings of the above cases, Respondent would have this Court impose liability on the railroad for failure to discipline, notwithstanding the absence of any evidence that a Missouri Pacific officer had knowledge of a rule violation.[9] In the absence of such evidence, it is obviously impossible to impose discipline, for the very concept of discipline requires the identification of an employee who can be the subject thereof. Respondent cannot point to any evidence in the record that prior to this incident a Missouri Pacific employee misused a torpedo and was not disciplined for

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9. Respondent's attempt to buttress his argument by referring to Mr. Darrington's excluded testimony of torpedo misuse is not availing because the proffered deposition testimony was not limited in time to the period prior to this incident. Thus, Mr. Darrington's testimony, even if the trial court had erroneously permitted the jury to hear it, would not have been evidence of torpedo misuse during the relevant period.

that conduct. Therefore, as a matter of law, there is no evidence of a negligent failure to discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ben G. Sewell, a member of the Bar of this Court, do hereby certify that on February _____, 1981, three (3) copies of the foregoing Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari were sent by certified mail, return receipt requested, to J. Donald Bowen, counsel of record for Respondent, at 2800 Two Houston Center, 909 Fannin Street, Houston, Texas 77002.

BEN G. SEWELL